IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 081596

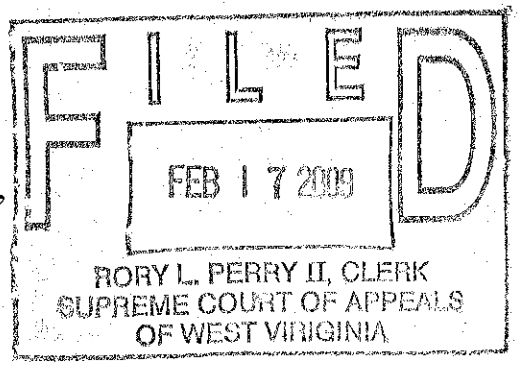
ENTERPRISE RENT A CAR OF KENTUCKY, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Appellants,

v.

WANG-YU LIN,

Appellee.



On Appeal from the Circuit Court of Kanawha County

Circuit Court Appeal No. 06-C-2372

APPELLANT BRIEF OF ENTERPRISE RENT A CAR OF KENTUCKY and EMPIRE FIRE AND MARINE INSURANCE COMPANY

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KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

On March 19, 2008, the Honorable Jennifer Bailey Walker of the Circuit Court of Kanawha County entered an Order Granting Summary Judgment in favor of the Appellee, Wang-Yu Lin ("Mr. Lin"). The Order arises out of a cause of action by Mr. Lin against Shin Yi Lin ("Ms. Lin")[1] for personal injuries he sustained in a single vehicle accident while a passenger in a vehicle he had rented from Enterprise Rent A Car Of Kentucky ("Enterprise"). Ms. Lin was driving at the time of the accident. The underlying action also asserts a claim for declaratory relief against Enterprise and Empire Fire and Marine Insurance Company ("Empire"), seeking a determination as to coverage under the Supplemental Liability Protection policy (the "SLP policy") issued by Empire and purchased by Mr. Lin at the time he rented the vehicle. The parties filed cross motions for summary judgment on the insurance coverage claim, and the Circuit Court conducted a hearing on the motions on March 6, 2008. Thereafter, on March 19, 2008, the Court entered the Order and granted summary judgment in favor of Mr. Lin, finding that insurance coverage should be provided to Ms. Lin, as she would constitute an insured under the SLP policy issued by Empire to Enterprise in order to cover the injuries sustained by Mr. Lin.

The decision of the Circuit Court finding liability coverage for Ms. Lin under the SLP policy issued to Mr. Lin should be reversed on appeal and summary judgment should be granted in favor of Enterprise and Empire on the basis that there is no duty to defend or to indemnify Ms. Lin for the injuries sustained by Mr. Lin. The supplemental liability protection, as clearly and unambiguously stated in both the SLP policy and the Rental Agreement, explicitly excludes coverage for a loss arising out of the operation of the rental vehicle by a driver who is not the Renter or an Additional Authorized Driver and for a loss arising out of bodily injury sustained by the Renter. Moreover, the SLP policy excludes coverage for a loss arising out of the use of the

[1] The plaintiff, Mr. Lin, and the defendant, Ms. Lin, are not related in any manner.

vehicle in violation of the terms and conditions of the Rental Agreement. All these exclusions apply in the present case, and none are rendered inapplicable by either W.Va. Code § 17D-4-1, *et seq.*, or W.Va. Code § 33-6-31(a) because the supplemental liability coverage is over and above the statutory minimum limits of self-insured coverage on the rental vehicle, which has already been offered by Enterprise, and the SLP policy is optional excess rental coverage governed by a separate statute, W.Va. Code § 33-12-32.

STATEMENT OF THE FACTS

On August 18, 2006, Mr. Lin rented a 2006 Hyundai Accent from Enterprise at its location on Emily Drive in Clarksburg, West Virginia. At the time of the rental, Mr. Lin was a student at Salem International University and listed his address at West Main Street in Salem, West Virginia. The Rental Agreement reflects that no additional drivers were requested or added to the Agreement. A copy of the Rental Agreement is attached as Exhibit "A."

Specifically, the section of the Rental Agreement concerning Additional Authorized Driver(s) ("AADs") states that except as required by law, none are permitted without Owner's written approval. The following sentence in that section begins with "I request Owner's permission to allow" and is completed with "No other driver permitted." The same section on the Rental Agreement, which Mr. Lin signed, states that "Use of vehicle by an unauthorized driver will affect my liability and rights under this Agreement." Under Additional Terms and Conditions, the Rental Agreement further states as follows:

> 4. **Limits on Use and Termination of Right to Use.**
>
> a. Renter agrees to the following limits on use:
>
> (1) Vehicle shall not be driven by any person other than Renter or AAD(s) without Owner's prior written consent.

Ex. A.

Mr. Lin selected a number of optional coverages at the time he rented the vehicle, the one at issue in the present case being the Supplemental Liability Protection or "SLP", which provides the Renter and AADs with third-party liability coverage with a combined single limit per accident equal to the difference between the minimum financial responsibility limits of the laws of the state where the rental vehicle is operated and $1 million. The SLP covers bodily injury or property damage claims arising from the use or operation of the rental vehicle as permitted by the Rental Agreement. Mr. Lin signed the Rental Agreement in the appropriate place indicating that he accepted the SLP. The Rental Agreement identifies not only the SLP benefits, but also the SLP exclusions. The Agreement provides in pertinent part as follows:

> **SLP Exclusions:**
>
> **For all exclusions, see the SLP policy issued by Empire Fire and Marine Insurance Company. Here are a few key exclusions:**
>
> . . . (b) Loss arising out of bodily injury or property damage sustained by a Renter or AAD(s) or any relative or family member of Renter or AAD(s) who resides in the same household; (c) Loss arising out of the operation of Vehicle by any driver who is not Renter or AAD(s); . . . (j) **Loss arising out of the use of Vehicle when such use is otherwise in violation of the terms and conditions of the Rental Agreement.**

Ex. A.

After obtaining the vehicle from Enterprise, Mr. Lin was seriously injured in a single vehicle accident on August 20, 2006, on West Virginia Route 32 near Davis, West Virginia. Based upon the description in the West Virginia Uniform Traffic Crash Report, the driver of the vehicle lost control for unknown reasons, traveled off the east roadway edge, struck an embankment, overturned and reentered the roadway. The driver of the rental vehicle at the time of the accident was Ms. Lin, who was not an Additional Authorized Driver. Mr. Lin was a passenger in the vehicle.

Enterprise provides financial responsibility protection on its vehicle in an amount equal to the requirements of W.Va. Code § 17C-4-2 through a program a self-insurance. Enterprise is also the policyholder of the SLP policy issued by Empire, being Policy No. S1 10 16 33, with effective dates of September 1, 2005 to September 1, 2006. A copy of the SLP policy is attached as Exhibit "B." The SLP policy was approved by the West Virginia Office of the Insurance Commissioner on October 15, 1999 and has remained unchanged since that time. Section I – Liability Insurance of the SLP policy states that only the following are "insureds" under the SLP policy:

a. The "rentee" who has:

(1) Entered into a "rental agreement" with the "policyholder" shown in the Declarations;

(2) Elected under the "rental agreement" to purchase optional "supplemental rental liability insurance"; and

(3) Paid for optional "supplemental rental liability insurance".

b. Additional authorized drivers whose names appear on the "rental agreement", where the "rentee" has complied with a. (1), (2), and (3) above.

Ex. B. The SLP policy further states that any driver who is not an authorized driver under the terms of the Rental Agreement or whose name does not appear on the Rental Agreement is not an insured under the SLP policy. Additionally, the SLP policy states that the insurance does not apply to the following:

2. Loss arising out of the use of a "rental vehicle" when such use is in violation of the terms and conditions of the "rental agreement".

3. Loss arising out of "bodily injury" or "property damage" sustained by any "insured" or any relative or family member of the "insured" who resides in the same household.

4. Loss arising out of the operation of the "rental vehicle" by any driver who

is not an "insured".

Ex. B.

After the accident, Mr. Lin made a claim for his injuries under the SLP policy. Enterprise acknowledged its own $20,000 self-insured limit of liability on the rental vehicle and offered the same. Empire, however, denied excess coverage under the SLP policy as Ms. Lin was not authorized to drive the vehicle and because Mr. Lin, as an insured, was not covered for his injuries under the SLP policy. Mr. Lin thereafter filed suit in the Circuit Court of Kanawha County asserting a claim against Ms. Lin for his injuries and against Enterprise and Empire for a declaration of coverage under the SLP policy.

The parties filed cross motions for summary judgment on the insurance coverage issue, and the Court heard those motions on March 6, 2008. The Court entered its Order on March 19, 2008, and granted judgment in favor of Mr. Lin, finding that insurance coverage should be provided to Ms. Lin, as she would constitute an insured under the SLP policy in order to cover the injuries sustained by Mr. Lin. By Agreed Order of June 24, 2008, the Court decreed that the March 19, 2008 Order is a final judgment and there is no just reason for delay for the entry of judgment as required pursuant to Rule 54(b). It is from the March 19, 2008 Order that Enterprise and Empire appeal.

ASSIGNMENT OF ERROR

The Circuit Court erred in granting summary judgment for Mr. Lin and denying summary judgment in favor of Enterprise and Empire on the basis that Ms. Lin does not constitute an insured under the SLP policy issued by Empire to Enterprise. There is no dispute that Ms. Lin was not an Additional Authorized Driver. Moreover, the claim is excluded from coverage

because the rental vehicle was being used in violation of the terms and conditions of the Rental Agreement, and the loss arose out of bodily injury to an insured, Mr. Lin.

ARGUMENT

A circuit court's entry of summary judgment is reviewed *de novo.* Syl. Pt. 1, *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). The determination of the proper coverage under a liability insurance contract is a question of law which, like summary judgment, is reviewed *de novo* on appeal. *Payne v. Weston,* 195 W.Va. 502, 466 S.E.2d 161, 165-66 (1995). Thus, in undertaking this review, this Court will apply the same standard for granting summary judgment that is applied by the circuit court.

The Circuit Court of Kanawha County erred in granting summary judgment for Mr. Lin. In the Conclusions of Law, the March 19, 2008 Order provides that Mr. Lin constitutes an insured and presumably a named insured under the SLP policy and that Mr. Lin gave permission to Ms. Lin to drive the rental vehicle. Hence, Ms. Lin driving the rental vehicle at the time of the accident was a permissive use. The Order also states that the Rental Agreement is not a policy of insurance and that the SLP policy was not provided to Mr. Lin. Moreover, the Court notes in the Order that the Enterprise agent who sold the SLP policy was not given a program of instruction with respect to the sale of the SLP policy as required by W.Va. Code § 33-12-32. The Order further states that whether or not Mr. Lin was a named insured, he was a custodian of the rental vehicle so as to fall within the parameters of the omnibus statute, W.Va. Code § 33-6-31(a), which provides that the custodian of a vehicle can provide the requisite permission to invoke the mandatory coverage under the liability section of an automobile insurance policy. Additionally, the Order provides that Enterprise and Empire cannot avoid coverage by relying on the exclusion for an injury to the insured because neither the SLP policy nor a summary of coverage was

provided to Mr. Lin to make this exclusion plain, clear and conspicuous, and that the SLP coverage provided by Empire is separate and distinct from the coverage provided by Enterprise on the rental vehicle. Furthermore, the Order states that coverage for injuries to guest passengers is mandated under W.Va. Code § 33-6-29, and that for an insurance company to deny coverage based on an excluded driver, the exclusion must specifically designate the name of that driver.

These conclusions are in error for a number of reasons. First, the SLP policy that Mr. Lin purchased from Empire at the time he rented the vehicle afforded coverage in excess of or in addition to the $20,000 per person statutory minimum limits of self-insurance provided by the owner of the vehicle, Enterprise. Thus, pursuant to W.Va. Code § 17D-4-12(g), the SLP policy is not a "motor vehicle liability policy" and not subject to the requirements of § 17C-4-12(b)(2), which mandates that such a policy insure the person named therein and any other person, as insured, using any such vehicle with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle.

Second, our motor vehicle omnibus clause statute, W.Va. Code § 33-6-31(a), likewise does not apply because the prior opinions of this Court finding insurance policy provisions or exclusions inconsistent with this statute have only invalidated them up to the statutory minimum limits of $20,000 per person for bodily injury and have allowed the provision or exclusion to apply over and above that amount.

Third, a determination that there is no additional liability coverage for Ms. Lin under the SLP policy is not inconsistent with West Virginia case law regarding whether a driver who has consent from an insured other than the owner and named insured is a permissive user under the omnibus statute. In more than one case, this Court found no coverage when the consent came

from an insured who was a resident relative and who did not have express permission from the named insured to allow others to use the vehicle. In this case, permission for Ms. Lin to drive the rental vehicle could not be implied from Enterprise, as the owner and named insured of the vehicle, because of the express language of both the Rental Agreement and the SLP policy.

Fourth, there is a separate statute regarding automobile rental coverage, W.Va. Code § 33-12-32. The statute provides that the limited licensee to sell such coverage may offer or sell insurance only in connection with and incidental to the rental of vehicles in certain categories, including liability insurance, that provides coverage to *renters* and *other authorized drivers*. This statute is a departure from and outside the scope of the omnibus statute in that it does not mandate uninsured and underinsured coverage, nor does it require coverage for any permissive user. Moreover, the West Virginia Legislature, by permitting this type of coverage, and the Offices of the Insurance Commissioner, by approving the SLP policy form, both apparently recognize that this type of insurance is distinct from those policies governed by the omnibus statute and the motor vehicle financial responsibility law.

Fifth, even though a copy of the SLP policy itself was not provided to the renter, Mr. Lin, or the unauthorized driver, Ms. Lin, the precise terms and conditions Empire relies upon to deny coverage were explicitly stated in the summary of SLP coverage on the Rental Agreement, which Mr. Lin not only had in his possession but signed to acknowledge that he had read. Mr. Lin cannot contend that he was not on notice of the "authorized driver" and "injury to renter" provisions of the SLP policy. This position is not at all inconsistent with West Virginia case law requiring policy exclusionary clauses to be plain, clear and conspicuous, placing them in such a fashion as to make obvious their relation to other policy terms.

Lastly, there is case law on point in other jurisdictions regarding supplemental or excess liability insurance on rental vehicles which find various policy provisions and exclusions valid and not inconsistent with state omnibus clauses or public policy, even though they void or restrict coverage. These cases do not involve the state minimum limits on the vehicle provided by the rental company, such as those cited by Mr. Lin in the underlying proceeding, although in some instances, the exclusions there were applicable as well, despite omnibus clause requirements in those states. Accordingly, the March 19, 2008 Order should be reversed and summary judgment should be granted in favor of Enterprise and Empire in the present case.

I. NEITHER THE WEST VIRGINIA MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW NOR THE OMNIBUS STATUTE INVALIDATES THE POLICY PROVISIONS OR EXCLUSIONS IN THE EMPIRE SUPPLEMENTAL LIABILITY POLICY.

Empire determined that there was no coverage for the underlying bodily injury claim because the driver, Ms. Lin, was not the Renter or an Additional Authorized Driver and, therefore, was not an insured under the terms of the SLP policy. For the same reason, the exclusions for "loss arising out of the use of the rental vehicle in violation of the terms and conditions of the Rental Agreement" and "loss arising out of the operation of the rental vehicle by a driver who is not an insured" applied to the claim. Further, because the bodily injury claim was asserted by the insured, Mr. Lin, the exclusion for "loss arising out of bodily injury sustained by any insured" applied. The Court determined that these policy provisions and exclusions were not enforceable because Ms. Lin was a permissive user of the rental vehicle and West Virginia law, specifically W.Va. Code § 33-6-31(a), requires that the SLP policy afford liability insurance coverage to her as the driver. The Court did not address in its March 19, 2008 Order that the SLP policy provides only supplemental liability coverage.

A. The Terms Of The SLP Policy Are Not Inconsistent With The West Virginia Motor Vehicle Financial Responsibility Law.

The SLP policy purchased by Mr. Lin affords coverage in excess of or in addition to the $20,000 per person statutory minimum limit of self-insurance on the rental vehicle. W.Va. Code § 17D-4-12(g) (1991) provides as follows:

> Any policy which grants the coverage required for a motor vehicle liability policy may also grant any lawful coverage in excess of or in addition to the coverage specified for a motor vehicle liability policy and such excess or additional coverage *shall not be subject to the provisions of this chapter.* With respect to a policy which grants such excess or additional coverage, *the term 'motor vehicle liability policy' applies only to that part of the coverage which is required by this section.*

(*emphasis* added). Thus, the SLP policy is not a motor vehicle liability policy as defined by the statute and is not subject to the requirements of Chapter 17D, including those of W.Va. Code § 17D-4-12(b)(2), which mandates that such a policy insure the person named therein and any other person, as insured, using any such vehicle or vehicles with the express or implied permission of such named insured, against loss from the liability imposed by law for damages arising out of the ownership, operation, maintenance or use of such vehicle.[2]

In *Charles v. State Farm Mut. Auto. Ins. Co.*, 192 W.Va. 293, 452 S.E.2d 384, 390 (1994), this Court held that pursuant to W.Va. Code § 17D-4-12(g), coverage in excess of or in addition to the minimum requirements under W.Va. Code § 17D-4-7 (1979) is not subject to the provisions of Chapter 17D, Article 4, as to such excess coverage. The Court further held in the *Charles* case that while a Kentucky automobile policy required the application of mandatory minimum coverage in West Virginia, which is where the accident occurred, the policy excluded coverage for "bodily injury to the insured" to the extent that the limit of liability exceeded the

[2] Because the SLP policy is not a motor vehicle liability policy as defined by the statute and is not subject to the requirements of Chapter 17D, it need not include underinsured motorist coverage as alleged by the Appellee.

limit required by our law. This exclusion - which is the same one at issue in the present case - applied over the $20,000 minimum limit. Accordingly, because the SLP policy in the present case is a supplemental liability policy over and above the minimum limit, it may properly restrict insurance coverage to the Renter and Additional Authorized Drivers and thereby preclude such coverage for others even though they have the express or implied permission of the Renter, as would otherwise be mandated by statute. Moreover, the SLP policy may preclude coverage for bodily injury to an insured, as the Court allowed in the *Charles* case, since Mr. Lin can still recover the statutorily mandated limit.

B. The Terms Of The SLP Policy Are Not Inconsistent With The West Virginia Motor Vehicle Omnibus Clause Statute.

In addition, the West Virginia motor vehicle omnibus clause statute, W.Va. Code § 33-6-31(a), does not apply to the supplemental liability coverage in the SLP policy. The prior opinions of this Court finding that exclusions contained in automobile insurance policies are inconsistent with this statute only invalidate them up to the statutory minimum limits and have allowed the exclusion at issue to apply over and above that amount. Again, there is no dispute that the $20,000 self-insured limit on the rental vehicle from Enterprise is available to cover Ms. Lin to pay for damages to Mr. Lin. However, because she was not the Renter or an Additional Authorized Driver, she is not an insured under the terms of the SLP policy, and even if she does constitute an insured, liability coverage is excluded because the bodily injury claim is asserted by the insured, Mr. Lin, not a third party. These provisions are not void under West Virginia law because the liability coverage under the SLP policy is only in excess of the per person limit required by W.Va. Code § 17D-4-2.

In *Jones v. Motorists Mut. Ins. Co.*, 177 W.Va. 763, 356 S.E.2d 634, 636 (1987), this Court held that a "named driver" exclusion in a motor vehicle liability insurance policy in West

Virginia is of no force or effect up to the limits of financial responsibility required by W.Va. Code § 17D-4-2 (1979) because the insurer could not issue a valid policy that excluded from its coverage for third-party liability purposes, any driver using the vehicle with the insured's permission. However, above those mandatory limits, such an exclusion is valid under W.Va. Code §33-6-31(a) (1982). The Court stated that beyond the mandatory twenty thousand dollar bodily injury for one person minimum coverage requirements, W.Va. Code § 33-6-31(a) allows an insurer and an insured to agree to such an endorsement. *Id.* at 637.

In *Dairyland Ins. Co. v. East*, 188 W.Va. 581, 425 S.E.2d 257, 261 (1992), the Court held that for the same reasons it concluded in *Jones* that a "named driver" exclusion was valid above the limits of financial responsibility imposed by W.Va. Code § 17D-4-2, a "named insured" exclusion endorsement is similarly valid above the statutorily imposed minimum amounts of coverage. The Court further held in *East* that the insured who was a passenger in her own vehicle was not a "guest passenger" within the provision of W.Va. Code § 33-6-29 (1992). Thus, the named insured exclusion did not conflict with and was not invalidated by the guest passenger statute.[3]

In *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568, 574 (1990), the Court held that an "intentional tort" exclusion in a motor vehicle liability insurance policy is precluded under the motor vehicle safety responsibility law, up to the minimum amount of insurance coverage required. However, the exclusion will operate as to any amount above the statutory limit. The Court observed that "under subsection (g) of W.Va. Code § 17D-4-12, there is a clear expression by the legislature that these more restrictive statutory conditions imposed under our financial responsibility law are *not applicable to any excess insurance coverage* provided in the policy." *Id.* at 573 (emphasis added). Similarly, in *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d

[3] For this reason, Mr. Lin does not constitute a "guest passenger" under W.Va. Code § 33-6-29.

533, 539-40 (1997), the Court held that an "owned but not insured" exclusion that precludes recovery of statutorily mandated limits of uninsured motorist coverage required by W.Va. Code § 17D-4-2 (1979) and § 33-6-31(b) (1988) is void and ineffective. However, the exclusion is valid and enforceable above the mandatory limits of such coverage.

C. The Terms Of The SLP Policy Are Not Inconsistent With West Virginia Case Law On Permissive Users.

Furthermore, a determination that there is no additional liability coverage for Ms. Lin under the SLP policy is consistent with West Virginia case law addressing whether a driver who has consent from an insured other than the owner of the vehicle and the named insured is a permissive user under the omnibus statute. In more than one case, this Court found there was no coverage when the consent came from an insured who was a resident relative but who did not have express permission from the named insured to allow others to use the vehicle. For example, in *Metropolitan Property and Liability Ins. Co. v. Acord*, 195 W.Va. 444, 465 S.E.2d 901 (1995), the Court held that the state motor vehicle omnibus clause statute, W.Va. Code § 33-6-31(a), requires an insurer to provide coverage when permission has been granted by the insured owner of the vehicle or its authorized agent to a driver who then causes injury or property damage during the permissive use. *Id.* at 906, citing *Universal Underwriters Ins. Co. v. Taylor*, 185 W.Va. 606, 408 S.E.2d 358, 364 (1991). However, consistent with the omnibus clause, an insurer may properly deny liability coverage where the insurance policy provides that a driver who is not otherwise insured under the policy must have received the named insured's express permission to use the automobile, and the driver lacked such permission prior to using the vehicle. *Id.* at 907. In *Acord*, the Court found there was no uninsured motorist coverage for an accident that resulted in the death of the insured's son who was a passenger in the insured's car driven by another person. In *Allstate Ins. Co. v. Smith*, 202 W.Va. 384, 504 S.E.2d 434 (1998),

the Court affirmed the holding in *Acord* and held that an automobile liability insurance policy did not cover injuries sustained by a passenger in the insured vehicle driven by a motorist who had permission from the named insured's resident relative but not from the vehicle's owner.

In the present case, there is no question that as the renter of the Enterprise vehicle and an insured under the Empire policy, Mr. Lin was permitted to operate the vehicle. However, Mr. Lin could not allow others to drive the rental vehicle, and such permission cannot be implied from Enterprise as the owner and named insured because of the express language of both the Rental Agreement and the SLP policy. In particular, the section of the Rental Agreement concerning Additional Authorized Driver(s) states that except as required by law, none are permitted without Owner's written approval. The following sentence in that section begins with "I request Owner's permission to allow" and is completed with "No other driver permitted." The same section on the Rental Agreement, which Mr. Lin signed, states that "Use of vehicle by an unauthorized driver will affect my liability and rights under this Agreement." Under Additional Terms and Conditions, the Rental Agreement further states that the Renter agrees that the Vehicle shall not be driven by any person other than Renter or AAD(s) without Owner's prior written consent.

Ms. Lin is not unlike the drivers in the *Acord* and *Smith* cases. While she had the permission of an insured to use the vehicle, she did not have the consent of the owner and named insured. In fact, Enterprise explicitly prohibited any driver other than Mr. Lin from using the vehicle, a restriction to which Mr. Lin agreed. *Acord* and *Smith* are also substantially similar because the injured insured passenger did not have the consent of the named insured owner to allow others to drive the vehicle. *See also Integon National Ins. Co. v. Welcome Corporation*, 53 F.Supp.2d 599 (S.D. N.Y. 1999) (although Virginia Omnibus Insurance Statute requiring that

automobile policy provide coverage for persons using vehicle with express or implied consent of named insured is remedial and should be liberally construed to broaden coverage, coverage generally does not extend beyond first permittee when named insured has expressly prohibited operation of vehicle by another, such that rental car customer negated liability coverage by allowing unauthorized third party to drive car). In light of this authority, any argument by the Appellee that as the renter of the vehicle, he was a "custodian" of the vehicle who could in turn grant Ms. Lin permission to drive it is simply without merit.

The Appellee relies upon *State Farm Mutual Automobile Insurance Company v. Budget Rent-A-Car Systems, Inc.*, 359 N.W.2d (Minn. Ct. App. 1984), for the proposition that coverage is available to an unlisted additional driver on a rental company's excess policy by virtue of the initial permission rule as articulated by Minnesota law. His reliance on this case is flawed for a number of reasons. First, as explained above, West Virginia does not require an extension of coverage to a driver who did not have the consent of someone other than the owner and named insured. Ms. Lin was operating the vehicle with permission from Mr. Lin, but Mr. Lin did not have the consent of Enterprise to allow her or anyone else to operate the vehicle. In fact, as set forth above, the Rental Agreement specifically states that no other driver was authorized by Enterprise to use the vehicle. Second, the Minnesota case does not involve an omnibus statute, but rather an omnibus clause contained within the excess policy held by Budget extending coverage to Budget "as well as any individual driving with Budget's permission." *State Farm*, 359 N.W.2d at 675. Further, the omnibus clause at issue in *State Farm* did not limit coverage should the renter violate the terms of the rental agreement. Without this language, the *State Farm* court applied Minnesota's initial permission rule to find coverage for the unauthorized driver. *But see Avis Rent-A-Car System v. Vang*, 123 F.Supp.2d 504, 509 (D.Minn. 2000)

(holding that disclaimer in rental company's excess policy excluding the renter's violations of the rental agreement expressly precluded the application of Minnesota's initial permission rule). *See also Weathers v. Royal Indemnity Co.*, 577 S.W.2d 623 (Mo. 1979); and *Continental Ins. Co. v. Body*, 557 F.Supp. 1139 (D.C.V.I. 1983). The SLP policy in this case specifically excludes coverage for a loss arising out of the operation of a rental vehicle by a driver who is not the Renter or an Additional Authorized Driver. The SLP policy also specifically excludes coverage for a loss arising out of the use of the vehicle in violation of the terms and conditions of the Rental Agreement. Accordingly, any reliance on *State Farm* in light of the previous holdings of this Court in *Acord* and *Smith* as well as the express language of the SLP policy is misplaced as specifically recognized in *Avis Rent-A-Car System v. Vang*.

Because the SLP policy is supplemental liability coverage and affords coverage in excess of or in addition to the available statutory minimum limits for bodily injury, the terms and exclusions relied upon by Enterprise and Empire to deny coverage, even if otherwise inconsistent with the omnibus statute, are not invalidated by W.Va. Code § 33-6-31(a), W.Va. Code §17D-4-2 or West Virginia common law. Thus, the definition of an insured under the SLP policy and the exclusions for loss arising out of the use of the rental vehicle in violation of the Rental Agreement and for loss arising out of the use of the rental vehicle by a person who is not an insured are valid. In addition, the exclusion for loss arising out of bodily injury to an insured is enforceable.

II. AUTOMOBILE RENTAL COVERAGE LIKE THE SUPPLEMENTAL LIABILITY POLICY IN THE PRESENT CASE IS GOVERNED BY W.VA. CODE § 33-12-32.

Because the SLP policy was issued by Empire incidental to the rental of the Enterprise vehicle, the policy is governed by W.Va. Code § 33-12-32 (2004), which provides that the

Insurance Commissioner is authorized to issue limited licenses for the sale of automobile rental coverage.[4] Although W.Va. Code § 33-12-32 discusses the licensing requirements for rental company counter agents, this statute identifies the type of rental coverage that may be sold and how it differs from other standard automobile liability coverage. Pertinent sections of the statute provide as follows:

> (h) No automobile rental coverage insurance may be issued by a limited licensee pursuant to this section unless:
>
> (1) The rental period of the rental agreement does not exceed ninety consecutive days; and
>
> (2) At every rental location where rental agreements are executed, brochures or other written material are readily available to the prospective renter that:
>
> (A) Summarize, clearly and correctly, the material terms of coverage offered to renters, including the identity of the insurer;
>
> (B) Disclose that the coverage offered by the rental company may provide a duplication of coverage provided by the renter's personal automobile insurance policy, homeowner's insurance policy, personal liability insurance policy or other source of coverage;
>
> (C) State that the purchase by the renter of the kinds of coverage specified in this section is not required in order to rent a vehicle; and
>
> (D) Describe the process for filing a claim in the event the renter elects to purchase coverage.
>
> (3) Any evidence of coverage on the face of the rental agreement is disclosed to every renter who elects to purchase the coverage.
>
> (4) The limited licensee to sell automobile rental coverage may offer

[4] The classification of the SLP policy is not a new argument raised on appeal. Enterprise and Empire have consistently argued that the SLP policy is outside the scope of the omnibus statute and have not waived any argument. The Appellee cannot argue that he is unfamiliar with W.Va. Code § 33-12-32 and its applicability to this case because he first raised the application of W.Va. Code § 33-12-32 in briefing before the Circuit Court, although he now attempts to distinguish the breadth of the statute on appeal.

> or sell insurance only in connection with and incidental to the rental of vehicles, whether at the rental office or by preselection of coverage in a master, corporate, group rental or individual agreements in any of the following general categories:
>
> (A) Personal accident insurance covering the risks of travel, including, but not limited to, accident and health insurance that provides coverage, as applicable, to renters and other rental vehicle occupants for accidental death or dismemberment and reimbursement of medical expenses that occurs during the rental period;
>
> (B) Liability insurance (which may include uninsured and underinsured motorist coverage whether offered separately or in combination with other liability insurance) that provides coverage, as applicable, to renters and other authorized drivers of rental vehicles for liability arising from the operations of the rental vehicle;

It is evident from the language of this statute that automobile rental coverage is distinct from other types of automobile insurance. Specifically, the liability insurance must provide rental coverage only to "renters" and "other authorized drivers" of rental vehicles. The SLP policy at issue in this case comports with the requirements of this statute by affording the supplemental liability protection to the "Renter" and "Additional Authorized Drivers." As set forth above, Ms. Lin was neither the Renter nor an AAD of the Enterprise vehicle. If the statute had intended to require liability coverage for persons using the vehicle with the express or implied permission of the insureds, it could have incorporated the same language found in W.Va. Code § 17D-4-12(b)(2) or W.Va. Code § 33-6-31(a). However, it does not.

This statute is also departure from and outside the scope of the motor vehicle omnibus clause statute in that it permits but does not mandate uninsured and underinsured coverage in a liability policy for automobile rental coverage.[5] Moreover, the West Virginia Legislature, by permitting this type of coverage, and the Offices of the Insurance Commissioner, by approving

[5] Because the SLP policy is governed by W.Va. Code § 33-12-32, it does not need to include underinsured motorist coverage as alleged by the Appellee.

the SLP policy form, both recognize that this type of insurance is distinct from those policies governed by the omnibus statute and the motor vehicle financial responsibility law. W.Va. Code § 33-6-10(a) (1996) provides that insurance contracts must contain the standard provisions required by the applicable provisions of Chapter 33 pertaining to contracts of a particular kind of insurance; however, the Insurance Commissioner may waive the required use of a particular standard provisions in a particular insurance policy form, if she finds such provision unnecessary for the protection for the insured and inconsistent with the purposes of the policy, and the policy is otherwise approved by her.

Thus, to the extent the Insurance Commissioner does not require an automobile rental policy to afford liability insurance to persons other than renters and other authorized drivers, and approves a supplemental liability policy on a rental vehicle defining an insured as only the renter and additional authorized drivers pursuant to W.Va. Code § 33-12-32, that policy cannot be deemed inconsistent with West Virginia law. The automobile rental coverage statute is not unlike other West Virginia law which permits the State to have custom-designed automobile insurance policies that do not have to comply with other statutory requirements. *See Cook v. McDowell County Emergency Ambulance Service Authority, Inc.*, 191 W.Va. 256, 445 S.E.2d 197, 201 (1994) (broad discretion granted to State Board of Risk and Insurance Management under Governmental Tort Claims and Insurance Reform Act authorizes it to incorporate language absolutely limiting liability under custom-designed policy even if such language would ordinarily be in violation of uninsured/underinsured motorist statute, W.Va. Code § 33-6-31(b)).

III. ENTERPRISE PROVIDED MR. LIN WITH A CLEAR AND UNAMBIGUOUS SUMMARY OF THE COVERAGES AND EXCLUSIONS UNDER THE SUPPLEMENTAL LIABILITY POLICY.

There is no dispute that a copy of the SLP policy was not provided to Mr. Lin. The Circuit Court concluded that because the policy of insurance or a summary of coverage was never provided to Mr. Lin, the exclusions relied upon by the defendants were not conspicuous, plain and clear and placed in such a fashion as to make obvious their relation to other policy terms, citing Syl. Pt. 10, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). The Circuit Court is incorrect that a summary of coverage was not provided to Mr. Lin.

To the contrary, the Rental Agreement which Mr. Lin unquestionably received and signed identifies each and every policy provision and exclusion on which Enterprise and Empire relied to deny coverage to Ms. Lin. The Rental Agreement states as follows:

> **SLP Exclusions:**
>
> **For all exclusions, see the SLP policy issued by Empire Fire and Marine Insurance Company. Here are a few key exclusions:**
>
> . . . (b) Loss arising out of bodily injury or property damage sustained by a Renter or AAD(s) or any relative or family member of Renter or AAD(s) who resides in the same household; (c) Loss arising out of the operation of Vehicle by any driver who is not Renter or AAD(s); . . . (j) **Loss arising out of the use of Vehicle when such use is otherwise in violation of the terms and conditions of the Rental Agreement.**

While the Rental Agreement is not the SLP policy, the supplemental liability insurance was purchased incidental to the rental of the Enterprise vehicle and the SLP policy incorporates the Rental Agreement. Moreover, regardless of which document Mr. Lin received, he had adequate notice that there was no coverage for loss arising out of the operation of the rental vehicle by a driver who is not the Renter or an AAD or for loss arising out of bodily injury to the Renter or

AAD. Each of the relevant provisions and exclusions was brought to his attention in the Rental Agreement. Furthermore, the automobile rental coverage statute, W.Va. Code § 33-12-32, provides that at every rental location where rental agreements are executed, brochures or other written material must be readily available to the prospective renter that summarize, clearly and correctly, the material terms of coverage offered to renters, including the identity of the insurer. The statute does not state that the policy itself must be provided to the renter, just a clear, correct summary of the material terms of coverage. That was done in the present case.

Although not directly on point, a decision from this Court does provide some instruction in the present case. In *Romano v. New England Mut. Life Ins. Co.*, 178 W.Va. 523, 362 S.E.2d 334, 340 (1987), this Court found that where an insurer provides sales or promotional materials to an insured under a group insurance policy, which the insurer knows or should know will be relied upon by the insured, any conflict between such materials and the master policy will be resolved in favor of the insured. In *Romano*, the individual insured did not have a copy of the master policy and had received only a letter which contained a one page summary of the eligibility requirements and coverages provided under the plan along with a rate schedule. The summary failed to include a particular condition of eligibility contained in the policy. The Court did not base its ruling on whether the insured had received a copy of the group policy itself, but whether the summary he did receive was consistent with the policy.

In the present case, the summary Mr. Lin received in the Rental Agreement was entirely consistent with the terms of the SLP policy which was issued by Empire to Enterprise. The relevant provisions of the SLP policy were, in fact, brought to his attention. There was no allegation in his Motion for Summary Judgment or in his Response to the Petition for Appeal

that the summary of the SLP coverage and exclusions in the Rental Agreement were not conspicuous, plain and clear.

IV. CASE LAW IN OTHER JURISDICTIONS REGARDING SUPPLEMENTAL LIABILITY INSURANCE FOR AUTOMOBILE RENTAL COVERAGE IS PERSUASIVE.

Courts in other jurisdictions have considered the same or similar provisions and exclusions as those in the Empire SLP policy in other supplemental liability insurance policies on rental vehicles and found them to be valid and consistent with state omnibus clauses and public policy, even though they also void or restrict coverage. For example, in *TIG Ins. Co. v. Smith*, 243 F.Supp.2d 782 (N.D. Ill. 2003), an excess insurer of a self-insured automobile rental agency sought a declaratory judgment of no duty to defend or to indemnify the estate of a motorist killed in a collision while driving a rental car against a state court action brought by passengers injured in the same car. The District Court held that the agency could contract to limit coverage to only the renter, the renter's spouse, and additional drivers listed by the renter on the rental agreement, and such limitation was not contrary to the public policy of the state. The District Court stated that the limitation was in accord with the rental agency's interest in protecting its property and knowing in advance its liability exposure, and that the renter could easily have listed the driver as an additional authorized driver on the rental agreement, but did not. *Id.* at 785.

In *Avis Rent-A-Car System v. Vang*, 123 F.Supp.2d 504 (D. Minn. 2000), a rental car company and automobile insurer brought a declaratory judgment action against parties involved in an accident to determine their rights and liabilities. The District Court held that a non-authorized driver was not covered by the additional liability insurance ("ALI") policy. The driver who failed to complete the additional driver form for the rental car was not an "additional

insured" under the ALI policy and, thus, the policy did not cover the accident that occurred while the driver was operating the car. The automobile rental agreement included as "authorized drivers" only persons who had completed the form and were otherwise eligible to drive the car, and the ALI policy incorporated the definitions in the rental agreement. *Id.* at 508-09. The Court disagreed with the contention the "authorized driver" was an undefined or ambiguous term because it was defined in both the ALI brochure given to the renter at the time he purchased the ALI coverage and in the ALI policy that was available for his inspection. *Id.* at 508.

In *Lonesathirath v. Avis Rent A Car System, Inc.*, 937 F.Supp. 367 (E.D. Pa. 1995), passengers and an unauthorized driver of a rented automobile were injured in an accident with a uninsured tortfeasor and sued the rental agency and insurer that provided additional liability insurance to the renter through the agency, seeking a declaration that they were entitled the uninsured motorist ("UM") coverage equal to the $1 million limit of liability insurance. The District Court held that the agency had a statutory obligation to provide UM coverage in the amount of $15,000 per person and $30,000 per accident, and that obligation extended to the unauthorized driver. However, the agency's failure to obtain a waiver of UM coverage from the renter did not obligate the agency to provide plaintiffs with the full $1 million of UM coverage.

In *Geico v. Morris*, No. 95C-09-081-WTQ, 1997 WL 527982 (Del. Super. Ct. Feb. 19, 1997), the Court considered a dispute over the denial of liability coverage for the claims against the driver of a rental vehicle by the wife and step-son of the driver based upon the "family member" exclusion in the rental agency policy. The Court declined to invalidate the exclusion as being inconsistent with the state motor vehicle financial responsibility law. The Court found the exclusion would apply as long as the insured or the renter had an applicable insurance policy containing the required mandatory minimum liability coverage, that other insurance expressly

provided coverage for the rental vehicle, and the renter was provided written notice of the exclusion in the rental agreement. *Id.* at *6.

In *Piening v. Enterprise Rent-A-Car of Cincinnati*, No. C-060535, 2007 WL 2685147 (Ohio Ct. App. Sept. 14, 2007), the Court of Appeals held that the supplemental liability protection the renter purchased, in clear language, excluded losses arising out of bodily injury sustained by the renter and family members who resided in the renter's household. The exclusion was printed on the back of the Rental Agreement and on the ticket jacket that was provided to the renter when she rented the car. Thus, her estate did not have coverage under the SLP policy. *Id.* at *5. Similarly, in *Craster v. Thrifty Rent-A-Car System, Inc.*, 187 S.W.3d 33, 39 (Tenn. Ct. App. 2005), the Court of Appeals enforced an unambiguous rental contract the renter acknowledged that she voluntarily signed which, as written, provided that she had no coverage for bodily injuries she sustained under the supplemental liability insurance ("SLI") she purchased because the SLI contained an exclusion for "bodily injury to the renter." The renter had declined the personal accident insurance. *See also Empire Fire & Marine Ins. Co. v. Bennett*, No. L-1770-06, 2008 WL 110388 (N.J. Super. Ct. App. Div. Jan. 3, 2008) (although statutory provisions mandating automobile insurance evince strong legislative policy of assuring at least some financial protection for victims, effectuation of policy only requires coverage up to amount required by law, and where required minimum coverage is provided by primary liability coverage Enterprise provided to lessees of its vehicles, Empire could exclude coverage under supplemental rental liability insurance excess policy for accidents that occur while insured is under influence of alcohol); *Philadelphia Indemnity Ins. Co. v. Carco Rentals, Inc.*, 923 F.Supp. 1143 (W.D. Ark. 1996) (insurer providing excess liability insurance to rental car customers did not violate public policy by excluding coverage for operation of vehicle while renter was legally

intoxicated, and exclusion was not misleading or deceptive even though exclusion was not mentioned in rental record which renter signed and copy of policy was not available at rental premises, where exclusion was contained on rental folder jacket and where insurer's brochure specified there were exclusions for violations of terms of rental agreement); and *Arredondo v. Avis Rent A Car System, Inc.*, 24 P.3d 928, 931-32 (Utah, 2001) (additional liability insurance policy purchased by renter of vehicle was not purchased to satisfy statutory security requirement and, thus, insurer was not required to provide coverage for accident that occurred by rental car was driven by renter's non-covered minor child as additional policy provided excess coverage

The Appellee attempts to make some minor distinctions between these cases and the present case, perhaps to distract from their persuasive reasoning. Any minor factual differences are immaterial and do not diminish their relevance or applicability to the fundamental legal issue in this case. Thus, while there is no common law directly on point in West Virginia, there are numerous decisions from other state and federal courts which support the argument advanced by the Appellants in this case: there is no supplemental liability insurance coverage for the underlying bodily injury claim because the driver, Ms. Lin, was not the Renter or an Additional Authorized Driver and was, therefore, not an insured under the terms of the SLP policy. For the same reason, the exclusions for "loss arising out of the use of the rental vehicle in violation of the terms and conditions of the Rental Agreement" and "loss arising out of the operation of the rental vehicle by a driver who is not an insured" apply to preclude the claim. In addition, because the bodily injury claim was asserted by Mr. Lin, the exclusion for "loss arising out of bodily injury sustained by any insured" also applies. Moreover, none of these policy provisions are rendered void by either the West Virginia motor vehicle financial responsibility laws or the motor vehicle omnibus clause statute because the SLP policy is in excess of and in addition to

the statutorily mandated liability coverage on the rental vehicle and because the policy falls within the scope of the automobile rental coverage statute. Furthermore, each of these policy provisions was stated clearly and unambiguously in the Rental Agreement which Mr. Lin signed, stating that he had received and read the same.

CONCLUSION AND REQUESTED RELIEF

Enterprise and Empire respectfully requests that this Honorable Court reverse the March 19, 2008 Order issued by the Circuit Court of Kanawha County and grant summary judgment in favor of Enterprise and Empire, finding that there is no supplemental liability insurance coverage for Ms. Lin under the SLP policy, and, therefore, no duty to indemnify Mr. Lin for the injuries he sustained in the automobile accident at issue.

ENTERPRISE RENT A CAR OF KENTUCKY and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 0811596

WANG-YU-LIN,

Plaintiff,

v.

CIRCUIT COURT OF KANAWHA COUNTY
CIVIL ACTION NO. 06-C-2372 (Judge Walker)

SHIN YI LIN,
ENTERPRISE RENT A CAR OF KENTUCKY,
a Kentucky corporation, and
EMPIRE FIRE AND MARINE INSURANCE COMPANY,
a Nebraska corporation,

Defendants.

CERTIFICATE OF SERVICE

I, Erica M. Baumgras, counsel for Petitioners, Enterprise Rent A Car Of Kentucky and Empire Fire and Marine Insurance Company, do hereby certify that a true and exact copy of the attached *Appellant Brief of Enterprise Rent A Car of Kentucky and Empire Fire and Marine Insurance Company* and *Motion of Enterprise Rent A Car of Kentucky and Empire Fire and Marine Insurance Company for Leave to File Appellant Brief Out of Time* has been served on the following counsel of record on this the 17th day of February, 2009, via U.S. Mail and hand delivery:

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